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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CLARENCE DANIELS et al.,

Defendants and Appellants.

C052984

(Super. Ct. Nos.
05F03867, 05F04126)

OPINION ON REMAND

Convicted of a number of counts of robbery and burglary, defendants Clarence and Tyron Daniels appeal,¹ arguing:
(1) there was insufficient evidence to support their convictions of robbing J. C. (count 2); and (2) the trial court erred in imposing the upper term for robbery (count 1) based on facts not found by a jury or admitted by them. Clarence also argues that his conviction for possession of stolen property (count 5) must

¹ Because defendants have the same last name, we will refer to them by their first names for simplicity and to avoid confusion.

be reversed because he was convicted of stealing the same property and that his abstract of judgment must be amended to reflect a concurrent sentence on one of his burglary convictions (count 4).

Agreeing with Clarence's latter two arguments, we will reverse his conviction for possession of stolen property (count 5) and direct the trial court to correct the abstracts of judgment for *both* defendants to reflect concurrent sentences on count 4. Finding no merit in defendants' remaining arguments, we will affirm the judgments in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

As relevant here, the evidence showed that in May 2005, three men robbed King Jewelers at gunpoint. Present in the store at the time were the owner, his 12-year-old daughter (J. C.), and an employee.

In December 2005, defendants (and another individual²) were charged by amended consolidated information with three counts of robbery (counts 1 through 3) -- one count for each of the persons present in the store. Defendants were also charged with burglary (count 4), and Clarence was charged with possession of property stolen from King Jewelers (count 5). The information also contained two more counts of robbery (counts 6 and 8) and two more counts of burglary (counts 7 and 9) against Clarence relating to other incidents not directly at issue here. Counts

² Because only Clarence and Tyron are before us on appeal, we do not discuss the third culprit further.

6 and 7 were also charged against Tyron, but counts 8 and 9 were not. The information also contained various enhancement allegations.

Following trial in April 2006, a jury found both defendants guilty of counts 1 through 4 and found Clarence guilty of count 5. The jury found both defendants guilty of counts 6 and 7, but were unable to reach a verdict against Clarence on counts 8 and 9, and the trial court declared a mistrial on the latter counts (which were later dismissed).

As relevant here, the trial court chose count 1 as the principal term for both defendants and imposed the upper term of five years on both of them based on various aggravating circumstances the court found to exist. The trial court also imposed but stayed sentence on both defendants as to count 4 without stating whether the sentences were concurrent or consecutive. Finally, the court imposed a consecutive, stayed sentence on Clarence for count 5. Ultimately, Clarence received an aggregate prison term of 28 years and Tyron received an aggregate prison term of 25 years. Both defendants filed timely notices of appeal.

This court filed its original opinion in this case in December 2007. Thereafter, the California Supreme Court granted both defendants' petitions for review and ordered briefing deferred pending its decisions in two other cases: *People v. Towne* (2008) 44 Cal.4th 63 and *People v. Nguyen* (2009) 46 Cal.4th 1007. Following issuance of its decision in *Nguyen*, the Supreme Court transferred this case back to this court with

directions to vacate our decision and reconsider the cause in light of *Towne*, which we have done.

DISCUSSION

I

Sufficiency Of The Evidence: Robbery Of J. C.

Both Clarence and Tyron challenge the sufficiency of the evidence to support their convictions of robbing J. C. during the robbery at King Jewelers (count 2) because they contend there was no evidence any property was taken from her or that she was in actual or constructive possession of any of the property taken. They are mistaken.

The People effectively concede that the testimony at trial did not supply any evidence property was taken from J. C., but they contend the surveillance video of the robbery, which was admitted into evidence, "may provide sufficient evidence to uphold the robbery of [J. C.]" To bolster their suggestion that the video might provide the missing link, the People refer to the recitation in the probation reports (taken from a police report) that J. C. opened the cash register at gunpoint during the robbery, and one of the suspects took the cash from the register.³

In reply, Clarence does not dispute that the video may supply what was lacking in the trial testimony; he complains only about the People's reference to information from a police

³ At trial, J. C. testified that she did not remember if she did anything with the cash register during the robbery.

report that was not offered into evidence at trial. For his part, Tyron contends he must prevail on his challenge "[u]nless the video clearly shows J. C. opening the cash register."

Having now reviewed the video (which *the parties* should have done before filing their briefs), we find that it does indeed supply the evidence missing from the trial testimony. The video depicts J. C. opening the cash register for one of the robbers, and later depicts a robber removing things from the register. At trial, J. C.'s father testified that one of the things the robbers took during the robbery was cash from the cash register.

"[I]n order to constitute robbery, property must be taken from the possession of the victim by means of force or fear." (*People v. Nguyen* (2000) 24 Cal.4th 756, 761.) "Actual possession requires direct physical control, whereas constructive possession can exist when a person without immediate physical control has the right to control the property, either directly or through another person." (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1111-1112.)

By opening the cash register, J. C. demonstrated possession -- actual or constructive -- of the money inside. Accordingly, defendants' challenges to the sufficiency of the evidence of the robbery of J. C. (count 2) are without merit.

II

Clarence's Conviction For Possession Of Stolen Property

Clarence was convicted of both robbing King Jewelers (counts 1, 2, and 3) and possessing some of the property stolen

from King Jewelers (count 5). He contends -- and the People concede -- that this was impermissible. (See Pen. Code, § 496, subd. (a); *People v. Smith* (2007) 40 Cal.4th 483, 522.) We accept the People's concession and will therefore reverse Clarence's conviction for possession of stolen property (count 5).

III

Imposition Of Upper Term Sentences

Applying the Sixth and Fourteenth Amendments to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490 [147 L.Ed.2d at p. 455].) Under this rule, the "statutory maximum" is the maximum sentence the trial court may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Blakely v. Washington* (2004) 542 U.S. 296, 303 [159 L.Ed.2d 403, 413].)

In *People v. Black* (2005) 35 Cal.4th 1238 (*Black I*), the California Supreme Court rejected a claim of *Blakely* error, concluding "that the judicial factfinding that occurs when a judge exercises discretion to impose an upper term sentence . . . under California law does not implicate a defendant's Sixth Amendment right to a jury trial." (*Black I*, at p. 1244.)

In *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856], however, the United States Supreme Court held that

under *Blakely* and other decisions, California's determinate sentencing law does "violate[] a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments" to the extent the law allows a judge to impose an upper term sentence "based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." (*Cunningham*, at pp. 274-275 [166 L.Ed.2d at p. 864].)

On remand from the United States Supreme Court for reconsideration in light of *Cunningham*, the California Supreme Court held that "imposition of the upper term does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*People v. Black* (2007) 41 Cal.4th 799, 816 (*Black II*).)

As long as one legally sufficient aggravating circumstance is justified based on the defendant's record of prior convictions, then the imposition of the upper term does not violate the defendant's constitutional rights, even if the trial court does not expressly rely on the defendant's record of prior convictions to justify the upper term. (*People v. Stuart* (2008) 159 Cal.App.4th 312, 314.)

In *Towne*, the California Supreme Court held that "the aggravating circumstance that a defendant served a prior prison term or was on probation or parole at the time the crime was committed may be determined by a judge and need not be decided

by a jury. In addition, the aggravating circumstance that a defendant's prior performance on probation or parole was unsatisfactory may be determined by a judge, so long as that determination is based upon the defendant's record of one or more prior convictions." (*People v. Towne, supra*, 44 Cal.4th at pp. 70-71.)

Here, both defendants contend the trial court violated their rights under *Cunningham* by imposing the upper term sentence for robbery (count 1). For the reasons that follow, we disagree.

A

Tyron

The trial court sentenced Tyron to the upper term of five years based on "multiple circumstances in aggravation," specifically, "that these matters involve[d] planning and sophistication," that Tyron was "involved in violent conduct, which is a serious danger to society," that Tyron had "numerous" "sustained petitions in juvenile delinquency," that Tyron was "on parole when this current offense was committed," and that his "prior performance on juvenile probation was unsatisfactory."

Tyron first contends that an adjudication of juvenile delinquency cannot be treated as the equivalent of a prior adult conviction for purposes of imposing an upper term under *Cunningham* because there is no right to a jury trial in a delinquency proceeding. Our Supreme Court disposed of this argument in *Nguyen*, where it held that a prior juvenile

adjudication of criminal conduct *can* be used as a "prior conviction" for sentencing purposes without violating the United States Constitution. (*People v. Nguyen, supra*, 46 Cal.4th at pp. 1010-1012.)

Here, Tyron's juvenile record included sustained allegations of grand theft, unlawful taking of a vehicle, escape from a county facility, and attempted robbery. Under *Nguyen*, these juvenile adjudications qualified as "prior convictions" for purposes of *Cunningham*.

Tyron contends the trial court nonetheless violated his rights under *Cunningham* by relying on more than "the simple 'fact of a prior conviction.'" Specifically, Tyron contends the trial court was not entitled to impose the upper term based on the court's determination that his prior juvenile adjudications were "numerous."

Our Supreme Court rejected this very argument in *Black II*. Under that decision, the "prior conviction" exception under *Blakely* and *Cunningham* "include[s] not only the fact that a prior conviction occurred, but also other related issues that may be determined by examining the records of the prior convictions," including whether a defendant's prior convictions are numerous or of increasing seriousness. (*Black II, supra*, 41 Cal.4th at p. 819.)

Here, in light of the four juvenile adjudications noted above, the trial court's imposition of the upper term did not infringe on Tyron's constitutional right to jury trial because at least one legally sufficient aggravating circumstance -- the

fact that Tyron's "prior convictions" were numerous -- was justified based on his record of "prior convictions."

B

Clarence

The trial court sentenced Clarence to the upper term of five years "because . . . planning was involved, and [his] prior performance on parole was . . . unsatisfactory to the point [he] exhausted all of [his] available confinement time prior to being discharged on parole."

Clarence acknowledges his prior performance on parole is "related to criminal history," but he contends the "prior conviction" exception under *Blakely* and *Cunningham* must be construed narrowly and therefore does not encompass prior performance on parole.

Our Supreme Court addressed this issue in *Towne*, explaining as follows: "Whether the aggravating circumstance of a defendant's prior unsatisfactory performance on probation or parole [is properly subject to judicial factfinding] will depend upon the evidence by which that circumstance is established in a particular case. In some instances, the defendant's unsatisfactory performance on probation or parole is proved by evidence demonstrating that, while previously on probation or parole, he committed and was convicted of new offenses. . . . When a defendant's prior unsatisfactory performance on probation or parole is established by his or her record of prior convictions, it seems beyond debate that . . . the right to a jury trial does not apply. [¶] On the other hand, in some

instances, a finding of unsatisfactory performance could be based upon other evidence of misconduct that was not previously adjudicated in a criminal trial. . . . [¶] In circumstances in which a finding of poor performance on probation or parole can be established only by facts other than the defendant's prior convictions, we conclude that the right to a jury trial applies to such factual determinations." (*People v. Towne, supra*, 44 Cal.4th at p. 82.)

Regarding Clarence's performance on parole, the probation report here showed that he was released on parole from the California Youth Authority in July 2002. Eighteen months later, his parole was revoked and he was returned to custody after "numerous parole violations ranging from absconding parole to positive tests for the use of alcohol, negative peer association and failure to complete a substance abuse program." He was released on parole again in May 2004, but "never checked in with Parole and remained on missing status until he was arrested . . . in September 2004." He was ultimately discharged from parole in February 2005.

Because Clarence's poor performance on parole was established only by facts other than prior convictions-- i.e., the record does not show he had any adult convictions or juvenile adjudications of criminal conduct while on parole between July 2002 and February 2005 -- the trial court could not properly rely on Clarence's unsatisfactory performance on parole to impose the upper term. Nevertheless, reversal is not required because Clarence's numerous juvenile adjudications

before 2002, and his unsatisfactory performance on *probation* established by some of those adjudications, made him eligible for the upper term *regardless of his performance on parole*.

The probation report shows that Clarence's juvenile record before 2002 included three separate sustained petitions for misdemeanor burglary and one sustained petition for felony possession of stolen property. Clarence was eligible for the upper term based on these juvenile adjudications alone, without the need for any factfinding by a jury. Furthermore, the probation report showed that while on probation for the first misdemeanor burglary, Clarence had his second sustained petition for misdemeanor burglary, and while on continued probation thereafter he had the sustained petition for felony possession of stolen property and was placed in a correctional facility boot camp. Thus, Clarence's prior unsatisfactory performance on probation was established by his record of prior convictions, and this, too, made him eligible for the upper term without the need for any factfinding by a jury. Accordingly, the imposition of the upper term did not infringe on Clarence's right to a jury trial.

IV

Abstracts Of Judgment

In sentencing Clarence and Tyron for the burglary of King Jewelers (count 4), the trial court failed to state whether it was imposing the sentences on count 4 to run concurrently or consecutively to the sentences on defendants' other convictions. The People concede that in the absence of such an express

determination by the trial court, the sentences must run concurrently (see Pen. Code, § 669), and the abstracts of judgment for both defendants -- which show the sentences on count 4 as consecutive -- must be corrected. We accept the People's concession and will direct the trial court to correct the abstracts of judgment to reflect that the sentences on count 4 are concurrent for both defendants.

DISPOSITION

Clarence's conviction on count 5 (possession of stolen property) is reversed. In all other respects, the judgments are affirmed. The trial court is directed to correct the abstracts of judgment to reflect that the sentence for each defendant on count 4 is concurrent, rather than consecutive, and (as to Clarence only) to reflect the reversal of the conviction on count 5. The trial court is further directed to forward a certified copy of each amended abstract to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

SCOTLAND, P.J.

SIMS, J.